SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1137

In the Matter

of

SAM HABER, HERBERT A. SULSKY and IRWIN E. SIMENOWITZ, attorneys

SAM HABER,

Petitioner,

against

SAMUEL GREASON,

Respondent.

To the Honorables, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Prior to 1959, Respondent Sam Haber and Landon Zuckerman formed a partnership to practice law in the State of New York. On July 12, 1961, as a result of a continuing investigation by the Judicial Inquiry of Nassau County since 1959, disciplinary proceedings were instituted against both Zuckerman and Haber. On September 25, 1961 the matter was referred to a special referee who held hearings on fourteen separate days between June 11, 1962 and August 15, 1963. On August 15, 1963 the hearings were closed.

During this period one Herbert A. Sulsky had been continuously employed by the firm as an attorney. One Irwin E. Simenowitz also was employed by the firm, but temporarily left its employ from May of 1963 to October of 1963. After hearings had been closed in August 1963, Zuckerman and Haber had discussions with Sulsky as to the possibility of entering into a partnership agreement, which culminated in the agreement which is the basis for the present proceeding. Simenowitz was also consulted upon his return in October of 1963.

The agreement entered into provided that (a) in the successor firm the share of Zuckerman and Haber was 40% each, Sulsky 12½%, and Simenowitz 7½%; (b) Zuckerman and Haber were to receive $500 a week each; Sulsky $225 a week and Simenowitz $150 a week; (c) if for any reason Zuckerman and Haber should be unable to practice law, voluntarily or involuntarily, they each were to receive $250,000, payable $25,000 a year each for four years in weekly installments, and $10,000 a year each for fifteen years in weekly installments; the shares of the surviving partnership of Sulsky and Simenowitz were to be equal; both the latter were to be jointly and severally liable to Zuckerman and Haber for such payment of $250,000 each and insurance policies on the lives of Sulsky and Simenowitz were to be obtained, payable to Zuckerman and Haber, to insure payment of the $250,000 each. The agreement was to be effective January 1, 1964. On November 18, 1963 the hearings were re-opened for further testimony and closed. On November 25, 1963, letters were sent to the clients of the Zuckerman and Haber partnership asking that consent be given that their cases be handled by the new partnership of Zuckerman, Haber, Sulsky and Simenowitz. On July 27, 1964 the Special Referee filed his report, dated June 6, 1964, in the disciplinary proceedings against Zuckerman and Haber. On September 9, 1964 Petitioner moved to confirm the Referee's report in part and to disaffirm the report in part. On December 23,

1964 the Appellate Division adopted instructions to attorneys suspended from practice, effective January 1, 1965. By Order dated March 3, 1965 and entered March 11, 1965, Zuckerman was disbarred and Haber was suspended for five years, both effective April 9, 1965. Thereafter the Zuckerman, Haber, Sulsky and Simenowitz partnership sent letters to clients of the firm advising them that, effective April 9, 1965, Zuckerman and Haber would retire from membership in the firm and from the practice of law, and that Sulsky and Simenowitz would continue to practice law from the present location and offices, and requesting the clients to consent to the substitution of Sulsky and Simenowitz as attorneys in order to avoid any interruption in the orderly processing of their respective files.

POINT I

There is no denial of due process.

The Petitioner contends that by the imposition of sanctions against him for the "simple act" of entering into a partnership contract with other attorneys he has been deprived of property without due process of law. He neglects to state that the contract was entered into by him when a decision in a disciplinary action then pending against him was imminent, and that he was, here, charged with entering into the contract with the intent to circumvent the possible adverse consequences of the pending proceeding.

There is no question as to the fact of entering into the agreement or to the contents thereof. The sole issue before the State courts was the motivation for entering into the agreement and the ethical consequences thereof.

The trial court found as a matter of fact that the contract which is the subject of this petition was entered into with insidious intent under suspect circumstances. The

Petitioner's emphasis on his claim that the amounts to be paid under the contract were directly proportionate to a "quantum meruit evaluation of his interest in the firm" and that there was no finding that the evaluation of the partnership interest was disproportionate to its actual value, arises out of a failure to acknowledge or recognize the basis for the determinations of the courts of this State. The emphatic judicial disapproval was not directed against the alleged attempt or intent to fix a reasonable monetary value for the practice. It was concerned entirely with the relationship to and interest in the practice which would have remained in effect regardless of the nature or measure of punishment meted out in the pending disciplinary proceeding. Such a result would have made a mockery of the disciplinary proceeding. This is the evil inherent in the agreement and the reason why it offends public policy. (See *In Re Haber*, 27 AD 2d 576, 276 NYS 2d 353; affirmed without opinion 23 NY 2d 763; 296 NYS 2d 957—opinion of Appellate Division, Second Department, reprinted in full in appendix hereto.)

The disapproval of the contract by the courts deprived the Petitioner of nothing. He was, at all times, entitled to be compensated for the reasonable value of his services prior to his suspension (see *Flecha* v. *Goodman*, 31 Misc. 2d 444, 221 NYS 2d 825; *Shabbona Creston Oil & Gas Corp.* v. *Doherty*, 264 AD 909, 35 NYS 2d 839), a right which remained unaffected by the decisions now challenged by the Petitioner.

The power of the Appellate Division to discipline attorneys for unethical practice is set forth in Section 90 of the Judiciary Law of New York State. The procedure for such discipline has been fully upheld in both State and Federal Courts (Cf. *Erie County Water Authority* v. *Western New York Water Company*, 304 N.Y. 342, cert. denied 344 U.S. 892; *Ex Parte Wall*, 107 U.S. 265; *Anonymous* v. *Baker*, 306 U.S. 287).

Petitioner's contention that he was restricted in his right to freely contract is without merit. The right to contract is not absolute in that there are many restrictions by statute and otherwise in both State and Federal courts imposed upon this privilege. We therefore submit that the Appellate Division, Second Department, State of New York, in the exercise of its statutory disciplinary power, could without limiting Petitioner's power to freely contract, validly determine that the acts of Petitioner were contrary to the public policy of the State of New York, and designed to thwart judicial control over the privilege of membership at the Bar of this State.

Petitioner's further contention that he was denied due process under the decision of *Matter of Gault*, 387 U.S. 1, and *Matter of Ruffalo*, 390 U.S. 554, is further without merit in that due notice under the rules therein set forth was fully complied with.

Further, as to Petitioner's contention that deferred discipline is cruel and inhuman punishment, the Appellate Division, Second Department, further stated:

> "Since Sam Haber is already under suspension for five years, no further punishment is presently imposed, but this offense may be considered upon his application for reinstatement as an attorney and counselor at law."

We respectfully submit that by its very language the Appellate Division clearly stated that this act may be considered as well as any other possible unethical acts at the time of his application for reinstatement. This places no greater burden upon Petitioner than any other attorney as to his fitness to practice law before the Bar of this State.

CONCLUSION

The petition for the granting of a writ of certiorari should be denied.

Respectfully submitted,

EDWARD MARGOLIN,
Respondent,
Chief Counsel,
Judicial Inquiry on
Professional Conduct

Dated: April 1, 1969

Appendix "A"

In the Matter of Sam Haber, Herbert A. Sulsky and Irwin E. Simenowitz, attorneys.

Samuel Greason, petitioner; Sam Haber, Herbert A. Sulsky and Irwin E. Simenowitz, respondents.

In this proceeding to discipline three attorneys, respondents have moved to disaffirm the report of the Justice of the Supreme Court to whom the matter had been referred to hear and report; and petitioner has moved to confirm the report.

Prior to 1959 Landon Zuckerman and respondent Haber were law partners. In 1959 investigation proceedings were instituted against them. In 1960 the partnership employed respondent Sulsky (admitted to the Bar on October 26, 1949) and respondent Simenowitz (admitted to the Bar on June 18, 1958). On July 12, 1961 disciplinary proceedings were instituted against Zuckerman and Haber. On September 25, 1961 the matter was referred to a Special Referee, who held hearings on 14 days between June 11, 1962 and August 15, 1963, at which time the hearings were closed. Sulsky had been continuously employed by the firm. Simenowitz left in May, 1963, but returned in October, 1963.

On November 11, 1963 Zuckerman and the three respondents, as successors to the firm conducted by Zuckerman and Haber, entered into a partnership agreement, the making of which is the basis of the present proceeding. The agreement provided that (a) in the successor firm the share of Zuckerman and Haber was 40% each, Sulsky 12½%, and Simenowitz 7½%; (b) Zuckerman and Haber were to receive $500 a week each; Sulsky $225 a week; and Simenowitz $150 a week; (c) if for any reason Zuckerman and Haber should be unable to practice law, voluntarily or involuntarily, they shall each receive $250,000, payable $25,000 a year each for four years in weekly installments

and $10,000 a year each for 15 years in weekly installments; the shares of the surviving partnership of Sulsky and Simenowitz shall be 50% each; both the latter shall be jointly and severally liable to Zuckerman and Haber for such payment of $250,000 each; and insurance policies on the lives of Sulsky and Simenowitz shall be obtained, payable to Zuckerman and Haber, to insure payment of the $250,000 each. The agreement was to be effective January 1, 1964.

On November 18, 1963 the disciplinary proceedings against Zuckerman and Haber were reopened and closed.

On November 25, 1963 letters were sent to the clients of the Zuckerman and Haber partnership asking that consent be given that their cases by handled by the new partnership of Zuckerman, Haber, Sulsky and Simenowitz.

On July 27, 1964 the Special Referee filed his report, dated June 6, 1964, in the disciplinary proceedings against Zuckerman and Haber.

On September 9, 1964 petitioner moved to confirm the Referee's report in part and to disaffirm the report in part.

On December 23, 1964 this Court adopted instructions to attorneys suspended from practice, effective January 1, 1965.

By order dated March 3, 1965 and entered March 11, 1965, Zuckerman was disbarred and Haber was suspended for five years, both effective April 9, 1965.

Thereafter the Zuckerman, Haber, Sulsky and Simenowitz partnership sent letters to clients of the firm advising them that, effective April 9, 1965, Zuckerman and Haber would retire from membership in the firm and from the practice of law and that Sulsky and Simenowitz would continue to practice law from the present location and offices; and requesting the clients to consent to the substitution of Sulsky and Simenowitz as attorneys in order to avoid any interruption in the orderly processing of their respective files.

On May 26, 1965 a hearing was held before the Judicial Inquiry with respect to the partnership agreement of November 11, 1963. On June 22, 1965 disciplinary proceedings were recommended. On July 19, 1965 this Court directed the institution of disciplinary proceedings against the present three respondents. On November 22, 1965 the matter was referred to a Justice of the Supreme Court to hear and report. On March 31, 1966 the said Justice duly filed his report.

In our opinion, the evidence adduced warranted the following findings made by the Justice in his report of March 31, 1966: (a) that when respondent Haber entered into the November 11, 1963 partnership agreement he intended to circumvent and nullify the possibility of adverse consequences from the disciplinary proceeding then pending; and (b) that respondents Sulsky and Simenowitz in signing that agreement intended to, and did aid and abet Zuckerman and respondent Haber in that intention.

We confirm those findings and hold further that the conduct of the respondents in entering into this agreement was highly improper, since it was palpably designed to thwart judicial control over the privilege of membership at the Bar of this State.

On other aspects of the evidence adduced, we find that Zuckerman and respondent Haber were the prime movers in contriving this agreement and would have been the chief beneficiaries of its terms and provisions, if performed. We take this factor into consideration in the disposition of this matter.

We hold further that this type of agreement has not been previously passed upon by this Court and we now formally condemn it. It is contrary to public policy. Insofar as it was intended to operate herein, it has been abrogated and is no longer enforcible. The objectionable features of the agreement have not been implemented.

In mitigation of the offense, we find:

(a) This is the only transgression by Simenowitz and Sulsky of which the Court has been made aware;

(b) The agreement was brought to our notice because of written inquiry made directly to the Court by Simenowitz and Sulsky, in which they asked for advice concerning the procedures to be followed by them as successors in the larger partnership;

(c) So far as the Court is aware, no benefit has accrued to Zuckerman, previously disbarred, and Haber, previously suspended for five years; and

(d) No client or other person has been shown to have suffered damage or loss by reason of the execution of the agreement.

In view of the foregoing, we direct that a public censure be administered to Irwin E. Simenowitz and Herbert A. Sulsky. Since Sam Haber is already under suspension for five years, no further punishment is presently imposed, but this offense may be considered upon his application for reinstatement as an attorney and counselor at law.

Christ, Hill and Rabin, *J.J.*, concur.

Beldock, *P.J.* and Benjamin, *J.* dissent and vote to disbar all three respondents, with the following memorandum:

We agree with the majority that the findings of the reporting Justice should be confirmed. It is inescapable that the motivation for entering into this partnership agreement, in the imminent hour of disciplinary action against Zuckerman and Haber, was to create a continuing entity in which Zuckerman and Haber would still continue to hold a dominant interest in their law practice, in the event of disbarment or suspension, and thus avoid the necessity of returning the offices files to the clients for them to choose other counsel in the event of such disciplinary action. The

contract which envisioned a payment of $500,000 over a 19-year period necessarily contemplated a continued relationship and interest in the practice of the law by Zuckerman and Haber, since they would continue to get paid out of the earnings of the business long after any accruals to them by way of *quantum meruit* could possibly exist. This necessarily implied a continuing interest by disbarred or suspended lawyers in the practice of law.

We consider this agreement so evil in nature and so deliberate in purpose to frustrate the impact of any disciplinary action affecting Zuckerman and Haber that we disagree with the majority's recommendation that a public censure is adequate punishment for such misconduct. Where, as here, a seemingly ingenious scheme to subvert the normal and orderly operation of an impending disciplinary order of the Court is entered into, it is our view that any punishment short of disbarment is inadequate. We dissent and vote to disbar all three respondents — Haber, Sulsky, and Simenowitz.

December 28, 1966